

USES OF TRANSPARENCY

– journalism and privacy

An address by

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Introduction

I make two claims –

- 1 Journalism and privacy are compatible.
- 2 Privacy and transparency are inextricable.

On the face of it, these claims may seem as ill-fitting as a journalist becoming a privacy commissioner. But let us go behind the face – the face of the claims, and my face.

Journalism and privacy are compatible

Because some in media make invasion of privacy a staple of their businesses, it is mistakenly believed by many that the practice of journalism precludes respect for privacy. To many, the two concepts – journalism and privacy – seem incompatible. This view underrates the purpose and practice of journalism as I understand it. Journalism has dimensions that the purveyors of infotainment rarely allow.

We can describe these added dimensions of journalism, which to me are its essence, by attempting to answer the question: ‘What is journalism *for*, besides making money?’ By separating the role of journalism in civil society and in a healthy democracy from the business dimension of journalism, we need not deny that business role. It just helps, for present purposes, if we disentangle that role from the other dimensions. It is these other dimensions that need, from time to time, to be re-stated and turned over in the minds of practitioners and their audiences in countries where multi-dimensional journalism may safely be practised.

A few years ago I served on a committee of journalists and non-journalists who conducted the first public review in 50 years of the Australian Journalists’ Association Code of Ethics. To the question, what is journalism for, besides making money, the Brennan Committee responded –

Journalists describe society to itself. They seek truth.

They convey information, ideas and opinion – a privileged role.

They search, disclose, record, question, suggest and remember.

They inform citizens and animate democracy.

They give a practical form to freedom of expression.

Many journalists work in private enterprise, but all have these public responsibilities.

They scrutinise power, but also exercise it, and should be accountable.

Accountability engenders trust. Without trust, journalists do not fulfil their public responsibilities.¹

Broadly speaking, this is what made me love journalism – pre legal practice, pre statutory office. And this is what makes me love it still.

The members of the Australian Journalists' Association found in the words I have quoted enough to lead them to adopt substantially the same words as the preamble to their revised Code of Ethics.

In that Code the journalists committed themselves, among other things, to respect privacy. All journalism codes – whether developed by journalists or proprietors, whether for print, broadcast or new media – tend to have such a clause. We can conclude that respect for privacy is not seen by journalists as incompatible with a conception of journalism that they themselves draft and adopt.

Why should this be? Why no dissonance when respect for privacy is incorporated in journalism's own codes, and yet a certain coolness – even antagonism at times – when respect for privacy is built into the legal code of the society they serve? So long as privacy is understood as a right of natural persons – not governments or corporations – and so long as privacy is not read as a synonym for secrecy, then I can see no cause for antagonism. To me, respect for privacy and journalism, properly understood, are compatible.

To be sure, the two values – privacy and revelation; discretion and disclosure – clash in particular circumstances. Balances must be struck. Compromises are made. But this is

¹ *Ethics in Journalism: Report of the Ethics Review Committee*, MEAA/AJA Code of Ethics (Melbourne University Press, 1997)

commonplace in the daily work of law and journalism, of a privacy commissioner and of an editor. Journalists, working usually against the press of deadlines, daily balance values such as privacy with the public interest in disclosure.

Will the reporter just back from interviewing a public figure describe all that he or she saw and heard in the home of that public figure, whose son or daughter is at a particularly delicate stage of the tumultuous journey through the teenage years? Will the producer show that portion of the footage from an accident where a victim is in a particularly undignified state of undress, or distress? This kind of balancing is a fundamental part of the work of journalists worthy of the name. What else is it, if not respect for privacy? In my experience this is not alien to journalism, but rather, it is integral to it.

What else suggests that journalism and privacy are compatible?

First, the connection between privacy and individuality. At its most elemental, privacy permits and sustains individuality. Who among us cannot hear an internal note struck by the words of one scholar (expressed now in language that includes us all) –

The man [or woman] who is compelled to live every minute of his [or her] life among others, and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his [or her] individuality and human dignity. Such an individual merges with the mass. His [or her] opinions, being public, tend never to be different. His [or her] aspirations, being known, tend always to be conventionally accepted ones. His [or her] feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man [or woman]. Such a being... is not an individual.²

We all react to these words ourselves, alone. But for journalists they can evoke more. Let me explain.

² Edward Bloustein, cited in Thomas I Emerson's *The System of Freedom of Expression*, at 546.

One of the characteristics by which journalists tend to define themselves is their independence. Whether myth or part-myth, a sense of independence sustains the self-image of many journalists. Despite the pressures of spin doctors, of conglomerate or chain ownership of media, and of ‘groupthink’ among peers, one trait that journalists are supposed to cultivate is independence.

Another factor that makes privacy and journalism compatible is their joint work in lubricating the machinery of a democracy.

In his landmark study, not of privacy but of freedom of expression, Thomas Emerson concluded that –

A system of privacy is vital to the working of the democratic process. Democracy assumes that the individual citizen will actively and independently participate in making decisions and in operating the institutions of the society. An individual is capable of such a role only if he [or she] can at some point separate himself [or herself] from the pressures and conformities of collective life.³

We can see the compatibility of privacy and journalism also in the role of privacy as an instrumental freedom. The right to privacy appears in the basic human rights instruments, alongside other rights of critical significance to the practice of journalism. What is often neglected is the role of privacy in facilitating the practical enjoyment of other rights. I am thinking of freedom of expression, of freedom of belief or conscience, and of freedom of association.

As journalists go about their work of cultivating confidential sources; of charting and reporting new ideas and dissenting views that test our orthodoxies; and of chronicling the formation of new political movements and parties – as they do all this, journalists rarely reflect on the background role of enforceable rights to privacy.

But lovers of history as well as observers of contemporary events will attest that when freedom begins to wane, journalists are among the first to lose their privacy.

³ Thomas I Emerson, *The System of Freedom of Expression*

Privacy and transparency are inextricable

Many people find it odd to think that privacy protection requires transparency. But it does. And you will find this notion embedded in some privacy laws. For example, section 5 of Victoria's Information Privacy Act 2000.

I will not rehearse now the many ways in which personal information is collected by public and private sector organisations for a multiplicity of purposes, great and small. It is generally accepted that digital technologies have made vastly easier and cheaper the collection, matching, copying and dissemination of personal information. At the same time, different types of personal information are becoming available. Most potent of these is genetic information.

Against this contemporary background and foreseeable future, why is transparency so vital to privacy protection? For the oldest reason: because power over information means power itself. And because if privacy is to mean anything in this Information Age it must mean a measure of control – not total control – for the individual over his or her personal information. To check power and to preserve a measure of individual control, transparency is vital. In privacy circles, this is a commonplace. Standard privacy principles include requirements for collection notices, openness about information practices, and access rights. But in journalism, the close connection between this aspect of privacy protection – transparency – and of journalism itself, if noticed, tends to be unremarked and undervalued.

Privacy commissioners commonly work to force information issues into the open, to make transparent certain practices that deal in personal information but which have been opaque, even hidden, from the subjects of that information. Privacy commissioners conduct audits. They strive for the implementation and publication of Privacy Impact Assessments, a sibling of Environmental Impact Statements. They urge the statutory exposition of the purposes and permitted uses of various data sets. They press, not just for prerequisites such as judicial warrants to ensure that certain collections of information are lawful and supervised. They also press for the mandatory reporting of the number of warrants sought and the number granted. In their work, privacy commissioners may at

times be assisted by whistleblowers who have become troubled by the privacy-invasiveness of this or that practice in an organisation. Privacy commissioners make submissions to parliamentary committees, as specialists assisting generalists. In their annual reports, they publish. In media releases, they explain or they warn.

That's enough. Surely all this is familiar to journalists and to those who can recall that earlier summary of what journalism is for, besides making money. Have I not just described, in broad terms at least, much of the nuts and bolts of transparency as accountability? Is this not precisely what journalists ought to do in their service of civil society and of the electorate in any democracy? They too scrutinise; they examine; they analyse; they warn; they disclose.

Journalism, properly understood, is a necessary part of the means by which power is held to account. It is not sufficient. Also necessary are independent courts and legislatures that work well. We need to disperse Executive power wisely, and to check it with various independent statutory watchdogs such as auditors-general, ombudsmen and, in their modest specialism, privacy commissioners.

I have naturally put the focus on transparency as a method to extract accountability from government. But the uses of transparency are legion. Journalism must apply it also to other sources of power. But what about journalism itself? Media so often seem to be immune from the transparency, and therefore the accountability, that they can so effectively require of others.

Conclusion

I began with two claims: that journalism and privacy are compatible; and that privacy and transparency are inextricable.

On the face of the idea, apparent tension. But behind the face, some surprising connections. And behind the face of one privacy commissioner, a former journalist? Not tension, still less incompatibility. Just a new role – a bit part – in the long-running story of freedom under law.